HARRY H. WILSON

IBLA 77-461 Decided June 19, 1978

Appeal from decision of Alaska State Office, Bureau of Land Management, declaring several placer mining claims void ab initio. Serial Nos. F-23289, F-23290, F-23291.

Affirmed.

1. Mining Claims: Generally--Withdrawals and Reservations: Generally--Withdrawals and Reservations: Effect of--Secretary of the Interior--Words and Phrases

"Subject to valid existing rights." The Secretary of the Interior in making withdrawals "subject to valid existing rights" in PLO 5179 and PLO 5250 intended exceptions to withdrawal to apply in behalf of only those claimants who themselves held such valid rights at time of withdrawal. The Secretary did not intend existence of another's valid rights on withdrawal date to restrain withdrawal so as to allow a topfiling claimant to enter pertinent lands after withdrawal date and independently establish rights under mining laws.

2. Act of June 25, 1910--Administrative Authority: Generally--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--President of the United States--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of

The President had non-statutory authority to withdraw public land in addition to authority conferred upon him by Pickett Act, as amended, 43 U.S.C. §§ 141, 142 (1970). Such non-statutory authority was not limited by terms

of 43 U.S.C. § 142 providing that withdrawn lands shall remain open to location for metalliferous minerals.

3. Administrative Authority: Generally--Alaska Native Claims Settlement Act: Generally--Executive Orders and Proclamations--President of the United States--Secretary of the Interior--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of

Because of the President's delegation of his nonstatutory withdrawal authority to the Secretary of the Interior by E.O. 10355, the Secretary was endowed with sufficient authority to withdraw lands in issue without reliance upon sections 17(d)(1) and 17(d)(2) of Alaska Native Claims Settlement Act. Thus, distinctions between those two sections are not herein dispositive of question of Secretary's authority to withdraw lands in PLO 5250.

4. Administrative Procedure: Hearings--Appeals--Mining Claims: Hearings--Mining Claims: Withdrawn Land--Rules of Practice: Hearings--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

Appellant may not use appeal to Board or request for hearing under 43 CFR 4.415 as vehicle for petitioning Secretary of the Interior to have withdrawal revoked and land restored to entry.

5. Mining Claims: Determination of Validity--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Effect of

Mining claims located on lands previously withdrawn from entry under the mining laws are null and void ab initio.

APPEARANCES: J. Michael Robbins, Esq., Cole, Hartig, Rhodes, Norman, and Mahoney, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Harry H. Wilson has appealed from a July 6, 1977, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring several placer mining claims void ab initio because the lands involved had been withdrawn from appropriation under Public Land Order 5250 (37 FR 18730, September 15, 1972) prior to Wilson's filing his notices of location. Public Land Order 5250 was an amendment to Public Land Order 5179 (37 FR 5579, March 16, 1972). The statute primarily in issue here is the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, 43 U.S.C. § 1601 et seq. (Supp. III 1973).

The question for decision is whether the withdrawal of lands in Public Land Order 5250 operated to render appellant's locations of the claims invalid.

Thirty one claims, which the record indicates are for gold mining, are in dispute. In November 1972, notices of location were posted and recorded for the 11 claims grouped under Serial No. F-23289 and for the discovery claim on Hall Creek listed under F-23291. In May and June 1973, and then in May and June 1974, there were postings and recordings of the notices for the 12 claims in F-23290 and for the 8 claims in F-23291, respectively. 1/

Prior to any of these locations, however, the Secretary of the Interior issued Public Land Order 5250, withdrawing the described lands from "location and entry under the mining laws, 30 U.S.C. Ch. 2," inter alia. The State Office found that the "descriptions of the subject claims in the location notices indicate that the claims lie within the boundaries of the withdrawal," and issued its decision as noted above.

Wilson contends that Public Land Order 5250 did not render his claims void ab initio. We shall consider his arguments point by point below.

1.

Wilson notes that paragraph 2 of Public Land Order 5250 withdraws the lands involved "[s]ubject to valid existing rights," and he maintains that:

1/ The discovery claim on Hall Creek listed under F-23291 was initially posted and recorded in November 1972, and was reposted and rerecorded under substantially the same description in the May and June 1974 action.

> At the time PLO 5250 was promulgated, Alaska Milling & Mining Co., Inc. was on record as owner of approximately fourteen (14) placer mining claims encompassing land on Canyon and Hall Creeks. Presumptively Alaska Milling & Mining Co. possessed a valid existing right which prevented those claims from being withdrawn by the land order.

In November 1972, some two months after Public Land Order 5250 was issued, Wilson topfiled on the 14 claims held by Alaska Milling & Mining Company, and litigation followed. The Alaska Superior Court ruled in 1975 that between the two parties, Wilson had the superior possessory right. Alaska Milling & Mining Company, Inc., v. Wilson, No. 73-660 (4th Jud. Dist. Alaska, March 6, 1975, judgment amended April 14, 1975). 2/ Wilson insists that "[u]ntil declared invalid, the Alaska Milling claims operated as a continuous valid existing right and thus could not, under the terms of Public Land Order 5179 and Public Land Order 5250, be subject to the withdrawal."

[1] We hold that the Secretary of the Interior in making withdrawals "subject to valid existing rights" in Public Land Order 5179 and Public Land Order 5250 intended exceptions to the withdrawal to apply in behalf of only those claimants who themselves held such valid rights as of the time of the withdrawal. 3/ The Secretary did not intend the existence of another's valid rights on the withdrawal date to restrain the withdrawal so as to allow a top-filing claimant to enter the pertinent lands after the withdrawal date and independently establish rights under the mandate of the mining laws, 30 U.S.C. § 21 et seq. (1970). Our reasons for this construction follow.

The purpose of the "subject to valid existing rights" clause is merely to express the Department's recognition that established property rights are to be deferred to at the execution of the withdrawal. A valid location gives a claimant established rights because in 30 U.S.C. § 26 (1970) it is provided:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public

---

2/ See 30 U.S.C. § 30 (1970) and 40 CFR Part 3870 which provide for possessory right actions before state courts.

3/ We need not reach the question of the continuing rights of a successor in interest to a claimant who held valid rights on the date of withdrawal. Wilson was not a successor in interest to Alaska Milling & Mining Company. See Janelle Deeter, 34 IBLA 81 (1978); W.R. Strickler, 27 IBLA 267 (1976).

> domain, their heirs and assigns * * * so long as they comply with the laws of the United States * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations * * *.

In United States v. Heirs of John D. Stack, A-28157 (March 28, 1960) the Department stated:

> A discovery, to validate a claim, must be made while the land is open to the operation of the mining laws. If the Government withdraws the land from the operation of those laws prior to the time of discovery, the claim has not ripened into a property right entitled to protection under the laws of the United States. A discovery made after the withdrawal of the land from the operation of the mining laws will not validate a location. United States v. Wilmot D. Everett, et al., (A-27010 (Supp.), October 17, 1955).

We note that no discovery by Alaska Milling & Mining prior to the withdrawal of these lands has been argued or shown in this case. While the Stack case did not involve an express "subject to valid existing rights" clause, the decision there articulates the concept applicable herein. On this concept of protection of established property interests, see Appeals of the State of Alaska and Seldovia Native Association, Inc., 2 ANCAB 1, 84 I.D. 349, 369-70, 379-382 (1977).

In the instant case, appellant had at the time of withdrawal no property right to be protected under the "subject to valid existing rights" provision. He had not yet located the claims, 4/ and he did not acquire successor rights from Alaska Milling & Mining. Thus, he cannot conceivably avail himself of the protection of the "subject to valid existing rights" clause.

Our holding on this point is supported in Departmental precedent. In Lyman B. Crunk, 68 I.D. 190, 194 (1961), the appellants argued that their 1955 claims were "relocations" of claims originally located in 1927 on lands which were withdrawn in 1931, so that the 1955 claims

---

4/ See United States v. Vaux, 24 IBLA 289, 292-3 (1976), in which we stated that "contestee's claims * * * must be supported by a qualifying discovery of a valuable mineral deposit as of [the date of the withdrawal]. If not, the lands within the claims have not been excepted from the effect of the * * * withdrawal, and the claims cannot thereafter become valid, even if a subsequent qualifying discovery occurred."

were protected by the "subject to all valid rights" exception in the 1931 withdrawal order. The Deputy Solicitor held:

> * * * The Director properly held that the lands in question were withdrawn from mineral location prior to the dates on which the appellants' locations were made.
>
> The fact that there were older claims on the land cannot help the appellants. Although the withdrawals were made subject to existing valid claims, and did not affect these claims, it prevented any subsequent claims from being located, whether the older claims were properly maintained or not. * * * Thus, it is unnecessary to consider, as the Director did, whether the relocation of the claims by the appellants wiped out the older claims and placed the lands they covered into the withdrawals.

We note that appellants' position in Crunk was stronger than appellant's here since the Crunk appellants arguably were successors in interest re the 1927 locations.

2.

The second line of argument taken by Wilson is to the effect that the Secretary was without authority to withdraw these lands from mining locations in Alaska, including those for metalliferous minerals. Wilson supports this general proposition with several specific arguments.

Wilson first contends that "[n]o provision in s 17(d)(1) empowers the Secretary to withdraw any lands in Alaska from appropriation under the mining laws," and he emphasizes the phrasing in section 17(d)(1) which requires the Secretary to effect withdrawals "under his existing authority." 5/ Wilson points out that under the terms of the Pickett Act, as amended, 43 U.S.C. §§ 141, 142 (1970), the general withdrawal authority granted the President may not be invoked against locations for metalliferous minerals. 6/ Appellant also contends that the

---

5/ Sections 17(d)(1) and 17(d)(2) of Alaska Native Claims Settlement Act are at 85 Stat. 708-09, 43 U.S.C. § 1616(d)(1) and s 1616(d)(2) (Supp. III 1973). Hereinafter, the abbreviated forms "17(d)(1)" and "17(d)(2)," etc. will be used.

6/ 43 U.S.C. § 142 (1970) stated:

"All lands withdrawn under the provisions of this section and section 141 of this title shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals * * *." In section 704(a) of the Federal Land Policy and Management Act of

"public land laws" are distinguishable from the "mining laws" and the "mineral leasing laws," citing Udall v. Tallman, 380 U.S. 1 (1966), and urges that "[s]ince the Secretary used only his authority under the public land laws to effect § 17(d)(1) withdrawals, * * * the BLM is mistaken in stating that the Secretary intended to withdraw lands from application of mining laws based on the Secretary's authority under the public land laws."

The sources of authority stated in PLO 5250 for the withdrawals therein are sections 17(d)(1) and 17(d)(2)(A) of ANCSA and Executive Order No. 10355 (17 FR 4831, May 26, 1952) (cited also in 43 U.S.C. § 141 note (1970)). In E.O. 10355 the President said in part:

> * * * I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 * * *, and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, * * *. [Emphasis supplied.]

We note that the authority granted the Secretary by the President in E.O. 10355 expressly was not limited to the power conferred by the Pickett Act, as amended.

[2] The Department has in the past resolved factual situations and arguments analogous to those here. In Denver R. Williams, 67 I.D. 315, 316 (1960), the Deputy Solicitor held that "the President has general or inherent authority by virtue of his office to withdraw public land as well as the authority conferred upon him by the act of June 25, 1910 * * *." In P. and G. Mining Company, 67 I.D. 217 (1960), the Assistant Secretary had elaborated:

> It has long been recognized that the President of the United States, acting directly or through the heads of departments, may cause a particular portion of the public domain to be appropriated to public use, and, whenever a tract of land has been so appropriated, it is severed from the public domain so that laws which permit the acquisition of private rights

---

fn. 6 (continued)
1976 (FLPMA), P.L. 94-579, 90 Stat. 2792, the provisions of 43 U.S.C. §§ 141, 142 (1970), were repealed in major part, subject to the savings clause in section 701(a) of FLPMA, 90 Stat. 2786, 43 U.S.C.A. § 1701 note (West Supp. 1977).

> in public land do not apply. * * * Such authority remained unimpaired by the adoption of the act of June 25, 1910, * * *. It is not limited by the terms of section 2 of the 1910 act, as amended, which provides that lands withdrawn under the act "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals."
>
> *******
>
> In this instance, the withdrawal was made in the exercise of the President's inherent power, * * * although the authority conferred by the statute is also cited. * * * It is significant that in some instances wherein both the President's inherent authority and the statutory authority are relied upon there is a specific provision that mining activities shall not be prohibited. This indicates clearly that a full exercise of Presidential authority was intended in every instance wherein such language was not included in the withdrawal order. Accordingly, it cannot be supposed that a reference to the act of June 25, 1910, in the withdrawal order was intended to effect or has effected consent or acquiescence in the continuation of mining activities in the lands included in the Imperial National Wildlife Refuge.

The given rationale supporting the President's non-statutory withdrawal authority is that the Congress, by its long-standing acquiescence in the exercise of such power, has implied its approval. See United States v. Midwest Oil Company, 236 U.S. 459, 471, 474-75 (1915). In section 704(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2792, the Congress declared that "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) * * * [is] repealed * * *." Thus, the Congress has explicitly recognized that at least prior to October 21, 1976, the President enjoyed non-statutory withdrawal power in appropriate circumstances.

Public Land Order 5250 expressly withdraws all the affected lands from "location and entry under the mining laws, 30 U.S.C. Ch. 2," does not cite 43 U.S.C. § 141 or s 142 (1970), and does not except locations for metalliferous minerals from the withdrawal. In contrast, Public Land Order 5180 (37 FR 5583, March 16, 1972), cites 43 U.S.C. § 141 (1970) in its statement of authority and withdraws the given lands "from location and entry under the mining laws (except locations

for metalliferous minerals), 30 U.S.C. Ch. 2 * * *." This contrast shows that the Secretary exercised such authority as he had under the law selectively to withdraw lands from all types of location under the mining laws, including those for metalliferous minerals. See quotation from P. and G. Mining Company, supra.

This sort of exercise of authority is consonant with what the Congress intended when it enacted ANCSA. In the Conference Report on ANCSA, the conferees stated:

> [T]he conference committee anticipates that the Secretary will use this authority to insure that the purposes of this Act and the land claims settlement are achieved, that the larger public interest in the public lands of Alaska is protected, and that the immediate and unrestricted operation of all the public land laws 90 days after date of enactment--absent affirmative action by the Secretary under his existing authority--does not result in a land rush, in massive filings under the Mineral Leasing Act, and in competing and conflicting entries and mineral locations. [Emphasis supplied.]

1971 U.S. Code Cong. and Ad. News 2258. Although specifically directed to the grant of new authority for the Secretary to classify and reclassify Alaska lands, the quoted statement expresses a broad public interest purpose envisioned by the legislature. The Secretary's protection of lands in Public Land Order 5250 from all mineral locations is in harmony with this stated purpose.

In further support of his argument on the Secretary's authority, Wilson maintains that Public Land Order 5179 and Public Land Order 5250 are vague as to which lands were withdrawn under 17(d)(1) and which were withdrawn under 17(d)(2), and Wilson suggests that the Secretary may have exceeded the 80 million acre limitation stated in 17(d)(2) on 4-systems withdrawals. Wilson notes that approximately 80 million acres were withdrawn in Public Land Order 5179, and he urges that if those were 17(d)(2) withdrawals, then any additional 17(d)(2) withdrawals in Public Land Order 5250 were unauthorized. Wilson also points out that certain of his Hall Creek locations, F-23291, were filed on and recorded in 1974, which was after the statutory expiration of the 17(d)(2) withdrawals of the lands in issue. The Secretary did not recommend the lands in issue for inclusion in one of the four systems described in 17(d)(2). See 17(d)(2)(D).

[3] Because of the President's delegation of his non-statutory withdrawal authority to the Secretary by E.O. 10355, the Secretary was endowed with sufficient authority to withdraw the lands in issue

without reliance upon 17(d)(1) and 17(d)(2) of ANCSA. 7/ Thus, distinctions between those two sections are not herein dispositive of the question of the Secretary's authority to withdraw lands in Public Land Order 5250. It is enough to note that the provisions of ANCSA clearly indicate that it was in the public interest for the Secretary to exercise his E.O. 10355 authority to withdraw these lands.

By their terms, Public Land Order 5179 and Public Land Order 5250 were issued in reference to both 17(d)(1) and 17(d)(2) of ANCSA, and the Secretary exercised his non-statutory withdrawal authority with respect to mining locations in furtherance of both sections of ANCSA when he withdrew the lands listed in those two public land orders. E.O. 10355 states no acreage or time of filing limitations for withdrawals, nor does ANCSA impose such limitations on the Secretary's authority under that executive order. Thus, we conclude that appellant states no valid basis for relief in his contentions that the public land orders are vague on which lands were withdrawn pursuant to 17(d)(1) and which were withdrawn pursuant to 17(d)(2) of ANCSA, that the Secretary may have exceeded the 80 million acre figure, 8/ and that Wilson filed his 1974 location notices after the statutorily mandated expiration of 17(d)(2) withdrawals in Alaska.

3.

Appellant maintains that "the placer mining claims which Mr. Wilson located on Squaw Gulch and Hall Creek were not withdrawn by any secretarial land order." At first blush it may seem that appellant is correct on this point since Squaw Gulch and Hall Creek are not expressly referred to in Public Land Order 5179 or any of its amendments, including Public Land Order 5250. However, the BLM status plats, current to May 11, 1976, for T. 27 N., R. 22 E. and T. 28 N., R. 22 E., Copper River meridian, and for T. 8 S., R. 33 E., Fairbanks meridian, Alaska, show that the lands in dispute were in fact withdrawn under the descriptions given in Public Land Order 5250.

7/ It is not necessary for us to reach the question of whether ANCSA's 17(d)(1) provides or 17(d)(2) provided withdrawal authority independent of other grants of authority.

8/ The March 1972 withdrawals were readjusted through a series of September 1972 withdrawals, and a determination on whether the Secretary stayed within the 80 million acre figure requires an analysis of this series of public land orders taken comprehensively. We believe that such an analysis will show that the net effect of the September readjustments was that the total acreage withdrawn remained at the 80 million acre guideline.

Public Land Order 5250 withdraws, inter alia:

> All lands within the protracted survey sections which are wholly or in part within 1 mile of the mean high water mark of the river's banks and all islands and islets within the following named rivers and their named tributaries as they traverse the following described lands:
>
> *******
>
> CANYON CREEK (TRIBUTARY)
>
> FAIRBANKS MERIDIAN
>
> T. 8 S., R. 33 E.
>
> COPPER RIVER MERIDIAN
>
> T. 27 N., R. 22 E.
> T. 28 N., R. 22 E.

[Emphasis supplied.]

Both Hall Creek and Squaw Gulch flow into Canyon Creek, though at separate points, within section 32 of T. 28 N., R. 22 E., Copper River meridian. All of the following sections are wholly or partly within 1 mile of Canyon Creek: secs. 32, 33, T. 28 N., R. 22 E., and secs. 4, 5, 8, 9, T. 27 N., R. 22 E., Copper River meridian, and secs. 35, 36, T. 8 S., R. 33 E., Fairbanks meridian. Thus, each of these sections was withdrawn in its entirety under Public Land Order 5250. From the descriptions of Wilson's claims given in the various notices of location contained in the case files, it is clear that these withdrawn sections contain all of Wilson's claims. Thus, we agree with the BLM's finding that the lands in issue were withdrawn in Public Land Order 5250.

4.

[4] Appellant disputes the initial classification of Canyon Creek in furtherance of 17(d)(2) of ANCSA for potential inclusion in the Wild and Scenic Rivers System, and suggests that "Canyon Creek was listed as an afterthought and in total disregard to the mineral characteristics and mining history of this area." Appellant "requests a hearing to establish the facts justifying or disputing this classification."

The Board is faced with the dispositive facts here that the Canyon Creek lands were withdrawn by the Secretary under Public

Land Order 5250 in September 1972, and that the record contains no indication that this withdrawal had been revoked as of any of the material time periods herein. The Secretary stated the binding policy of this Department with respect to the Canyon Creek and other lands in Public Land Order 5250. As we said in J. P. Hinds, 25 IBLA 67, 72, 83 I.D. 275, 277 (1976):

> Appellants request a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on BLM's "continued refusal" to restore the land to entry. This request is denied. * * * If appellants wish to petition the Secretary of the Interior to have the withdrawal revoked and the land restored to entry they are at liberty to do so. This appeal, however, may not serve as the vehicle for making such a petition.

Cf. Serafina Anelon, 22 IBLA 104 (1975) (appellant's opinion that withdrawal served no useful purpose). Accordingly, we deny appellant's request for a hearing.

[5] Under the facts of this case and for the reasons discussed above, and because of the well-established rule that mining claims on lands previously withdrawn from entry under the mining laws are null and void ab initio, Robert L. Beery, 83 I.D. 249 (1976), J. P. Hinds, supra, we hold that the BLM acted properly in declaring appellant's claims null and void. Sally Lester, 31 IBLA 43 (1977), recon. denied, 35 IBLA 61 (1978).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge